

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**INCOME TAX REFERENCE No.181 of 1995****For Approval and Signature:****HONOURABLE MR.JUSTICE J.M.PANCHAL****AND****THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil judge?

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COMMISSIONER OF INCOME TAX - APPELLANT**Versus****DHATU SANSKAR PVT. LTD. - RESPONDENT**

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Appearance :

MS MONA BHATT for Applicant.

None- for Respondent SERVED BY RPAD - (N).

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL**and****THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI****Date : 15/06/2006****ORAL JUDGMENT****(Per : HON'BLE SMT. JUSTICE ABHILASHA KUMARI)**

The Income Tax Appellate Tribunal, Ahmedabad Bench 'C', has referred the following question for the opinion of this Court under Section 256(1) of the Income

Tax Act, 1961.

“Whether the Appellate Tribunal is right in law and on facts in directing the Assessing Officer to allow carry forward of the assessed loss even though the return was filed late, in view of the specific provisions of Section 80 of the Income Tax Act, 1961?”

2. The assessee is a company within the meaning of Section 2(8) of the Income Tax Act, 1961 and is engaged in the business of manufacturing Fluxes used by mini-steel plants for removing impurities from melted steel. For the assessment year 1984-85, the assessee was required to file the return on or before 30th June, 1983. The assessee had, by way of an application, sought time up to 30th August 1984 for filing the return for the year ending on 30th June 1983. The Assessing Officer passed an order on file refusing to extend time for filing the return. However, the refusal of extension of time sought by the assessee by way of its application was not conveyed to the assessee. The assessee had claimed to allow it to carry forward the assessed loss.

3. Proceeding on the footing that the time to file the return was extended upto 31st August, 1983, the assessee filed its return of income for the year ending on 30th June, 1983 on 30th July, 1984, disclosing the loss of Rs. 2,50,310/-. The return of income was supported with

audited statements of Profit and Loss Accounts and the balance sheet. The assessee had claimed to allow it to carry forward the assessed loss. Since the Assessing Officer did not allow to carry forward the loss on the ground that the return was filed late, the assessee, being aggrieved by the same, preferred an appeal before the Commissioner of Income Tax (Appeals), who directed the Assessing Officer to allow the carry forward of the assessed loss since the refusal for extension of time was not conveyed to the assessee. The Commissioner of Income Tax (Appeals) relied upon the case of ***CIT vs. Gordhanbhai Jethabhai, (1983) 142 ITA 84*** wherein the view has been taken that it was the statutory duty enjoined upon the Assessing Officer to entertain an application for extension of time to furnish the return and to render his decision on such application, and communicate the same to the assessee concerned. Another decision relied upon was in the case of ***Presidency Medical Center (Pvt.) Ltd. vs. CIT, (1977) 108 ITR 38 Calcutta*** wherein it is held that the loss has to be carried forward even if the return is filed within the time given in Section 139(4).

5. Thereupon, the Revenue preferred an appeal before the Tribunal. After taking note of the decisions relied upon by the Commissioner of Income Tax (Appeals)

and after hearing the Revenue and considering the written submissions by the assessee, the Tribunal came to the conclusion that the direction given by the first Appellate Authority was just and proper and called for no interference, thereby upholding the order of the Commissioner of Income Tax (Appeals). This has given rise to the instant Reference.

6. Though the assessee is duly served, it has neither appeared through its constituted agent nor through a lawyer. This Court has heard Ms.Mona M. Bhatt, learned counsel for the Revenue, at length and in great detail as well as considered the facts of the case.

7. The undisputed facts are that the assessee made an application to the Assessing Officer seeking extension of time up to 30th August 1984 for filing of the return for the year ending on 30th June 1983, but actually, it filed the return on 30th July 1984, i.e. within the period of extension of time sought by it. The application for extension of time was rejected by the Assessing Officer. Admittedly, the factum of rejection of the application for extension of time was not conveyed to the assessee.

8. It would be relevant, at this stage, to refer

to proviso to Section 139(1) of the Income Tax Act, 1961, which reads as under:

"Provided that, on an application made in the prescribed manner, the Income-Tax Officer may, in his discretion, extend the date for furnishing the return, and, notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of sub-section (8)."

A bare reading of the proviso reproduced above makes it very clear that the Income Tax Officer is vested with the discretion to extend the date for furnishing the return on an application made in the prescribed manner. In ***CIT vs. Gordhanbhai Jethabhai, (1983) 142 ITA 84***, referred to above, it has been observed that it is incumbent upon the Income Tax Officer, as empowered by Section 139(1) proviso, to take a decision on the application for extension of time for filing the return and to communicate the decision to the assessee concerned.

9. In the instant case, the Income Tax Officer had taken a conscious decision and rejected the application for extension of time. However, he had failed to communicate the rejection to the assessee concerned. In other words, he, having exercised the jurisdiction vested in him under proviso to Section 139(1) of the Income-Tax

Act, 1961, had failed to communicate to the assessee that the said discretion had been exercised against it.

10. What is the effect of such non-communication is to be seen and determined herein. The principles of natural justice are, by now, fully evolved and expounded by a catena of decisions. The importance of the rule of natural justice is not only to secure justice, but to prevent the miscarriage of justice. Admittedly, they do not supplant the law of land, but supplement it. These principles are enunciated in the case of **A.K.Kraipak & Ors. vs. Union of India & Ors., A.I.R. 1970 SC 150**, and have been followed in a number of judgments and are also relevant in the case in hand. The proviso to Section 139(1) of the Income-Tax Act vests the Income Tax Officer with the discretion to take a decision upon an application for extension of time for filing of the return. This discretion is to be exercised judiciously and not arbitrarily, and should not result into miscarriage of justice. The principles laid down by the Supreme Court in the above noted judgment are relevant in the facts of the present case because, the effect of non-communication of the decision to the assessee will result in injustice to it, inasmuch as it will be prevented from taking effective steps to file the return within time,

which it may have done, had such decision been communicated to it. The discretion vested in the Income Tax Officer has to be exercised fairly and judiciously, since such a decision is bound to affect the rights of the assessee and the failure to communicate the same is bound to affect it adversely.

11. Moreover, the very effectiveness of an order, which is not communicated to the person against whom it is made, is also questionable since such order would become effective only upon communication to the assessee against whom the decision has been taken. An order which operates to the detriment of the assessee and is not communicated to him, would not be an effective order. There is no rule requiring the person against whom an order is made to appear before the Assessing Officer on any specified date on which the order, refusing to extend period to file return, would be pronounced in his favour. The basic principle is that an order passed by an adjudicating body does not become effective until it is communicated to the person affected thereby. The principle is : "No communication, no order". This principle has been expounded by the Constitution Bench of the Supreme Court in the case of ***State of Punjab vs. Amar Singh Harika***, A.I.R. 1966 SC 1313. The brief facts

of the case were that the respondent Amar Singh Harika was Assistant Director, Civil Supplies, in the Patiala & East Punjab States Union (PEPSU). He was dismissed from service by an order purported to have been passed on 3rd June 1949, which was communicated to him on 2nd/3rd January 1953. He filed a suit against the State of Punjab alleging that the impugned order whereby he was dismissed was invalid, inoperative and illegal since it had been passed without holding any inquiry or following proper procedure. He further claimed a declaration that despite the said order of dismissal, he continued to be an employee of the State of Punjab and to hold his post as Assistant Director, Civil Supplies. The trial Court dismissed the suit of the respondent and, thereafter, the matter went up to the Supreme Court. The relevant discussion is in paragraph 11 of the judgment, which is reproduced hereinbelow:

“The first question which has been raised before us by Mr.Bishan Narain is that though the respondent came to know about the order of his dismissal for the first time on the 28th May 1951, the said order must be deemed to have taken effect as from the 3rd June 1949 when it was actually passed. The High Court has rejected this contention; but Mr.Bishan Narain contends that the view taken by the High Court is erroneous in law. We are not impressed by Mr.Bishan Narain's argument. It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. If the

appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to modify its order. It may be that in some cases, the authority may feel that the ends of justice would be met by demoting the officer concerned rather than dismissing him. An order of dismissal passed by the appropriate authority and kept with itself, cannot be said to take effect unless the officer concerned knows about the said order and it is otherwise communicated to all the parties concerned. If it is held that the mere passing of the order of dismissal has the effect of terminating the services of the officer concerned, various complications may arise. If before receiving the order of dismissal, the officer has exercised his power and jurisdiction to take decisions or do acts within his authority and power, would those acts and decisions be rendered invalid after it is known that an order of dismissal had already been passed against him? Would the officer concerned be entitled to his salary for the period between the date when the order was passed and the date when it was communicated to him? These and other complications would inevitably arise if it is held that the order of dismissal takes effect as soon as it is passed, though it may be communicated to the officer concerned several days thereafter. It is true that in the present case, the respondent had been suspended during the material period; but that does not change the position that if the officer concerned is not suspended during the period of enquiry, complications of the kind already indicated would definitely arise. We are, therefore, reluctant to hold that an order of dismissal passed by an appropriate authority and kept on its file without communicating it to the officer concerned or otherwise publishing it will take effect as from the date on which the order is actually written out by the said authority; such an order can only be effective after it is communicated to the officer concerned or is otherwise published. When a public officer is removed from service, his successor would have to take charge of the said office; and except in

cases where the officer concerned has already been suspended, difficulties would arise if it is held that an officer who is actually working and holding charge of his office, can be said to be effectively removed from his office by the mere passing of an order by the appropriate authority. In our opinion, therefore, the High Court was plainly right in holding that the order of dismissal passed against the respondent on the 3rd June 1949 could not be said to have taken effect until the respondent came to know about it on the 28th May 1951."

(Emphasis supplied)

Although this case pertains to dismissal from service, the principles of law laid down therein will be applicable to the present case as well.

12. A Constitution Bench of the Supreme Court has held in the case of ***Bachhitar Sing vs. State of Punjab & Another, A.I.R. 1963 SC 395***, which was also a case of departmental inquiry, that the two essential ingredients of an order of the State Government are that; (1) the order has to be expressed in the name of the Governor and (2) then it has to be communicated. Relevant portion of the said reported decision is reproduced hereinbelow:

"Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by cl.(1) of Art. 166 of the Constitution and then it has to be communicated. The Constitution, requires that the action must be taken by the authority concerned in the name of the Governor. It is not

till this formality is observed that the action can be regarded as that of the State. Constitutionally speaking, the Minister is no more than an adviser and that the head of the State, the Governor is to act with the aid and advice of his Council of Ministers. Therefore, until such advice is accepted by the Governor whatever the Minister or the Council of Ministers may say in regard to a particular matter does not become the action of the State until the advice of the Council of Ministers is accepted or deemed to be accepted by the Head of the State. Indeed, it is possible that after expressing one opinion about a particular matter at a particular stage a Minister of the Council of Ministers may express quite a different opinion, one which may be completely opposed to the earlier opinion. Therefore to make the opinion amount to a decision of the Government it must be communicated to the person concerned. It is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and therefore till its communication the order cannot be regarded as anything more than provisional in character."

(Paragraph 10)

13. Applying the principles enunciated by the Supreme Court in the above two judgments, it is very clear that an order, to be considered valid and effective, must be communicated to the person concerned, who is to be directly affected by that order. Non-communication of an order, which is likely to have a detrimental effect upon the person concerned, would not only be arbitrary and, therefore, violative of the principles of natural justice, but would also make the

order ineffective and incomplete.

14. In the instant case, the assessee filed its return on 30th July 1984, i.e. within the extended time sought by it. In the absence of any knowledge about the rejection of the application for extension of time, the assessee was well within its rights to entertain a belief that the time sought had been granted, as nothing to the contrary had been communicated to it. The failure to communicate the order of rejection of the application for extension of time made by the assessee had precluded it from taking any effective steps or remedial measures in the direction of filing the return of income within time, which, may have been done, had such order been communicated. Therefore, it can safely be said that such non-communication of the factum of rejection of the assessee's application was prejudicial to the assessee and neither just nor reasonable. On the basis of ineffective order refusing to extend time to file return, the claim of the assessee to allow it to carry forward the assessed loss could not have been denied, on the ground that the return of income was filed late.

15. In view of the above discussion and the principles laid down by the Supreme Court in the above-

quoted decisions, this Court is of the opinion that the Appellate Tribunal was right in law and on facts in directing the Assessing Officer to allow carry forward of the assessed loss even though the return was filed late, in view of the specific provisions of Section 80 of the Income Tax Act, 1961. The Reference, therefore, will have to be answered in the affirmative, i.e. in favour of the assessee and against the Revenue.

16. For the foregoing reasons, the question referred to this Court for opinion is answered in the affirmative, that is, in favour of the assessee and against the Revenue. The Reference stands disposed of accordingly. There shall be no orders as to costs.

[J.M.PANCHAL, J.]

[SMT. ABHILASHA KUMARI, J.]

Rajendra